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IN THE

Supreme Court of the United States

October Term, 1998

POLMAR FISHERIES, INC.,
Petitioner,
vs.
SUSAN VIOLA HURLBURT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO QUESTIONS PRESENTED FOR REVIEW

In spite of Petitioner listing several "questions," there is only one question in this case: Is there a sufficient fact basis for the trial court to find Respondent Susan Viola Hurlburt was a Jones Act/General Maritime Law seaman as of the time and place of her back injury, that is, was there a sufficient fact basis for the trial court to find that the vessel F/V NORTHLAND was a vessel in navigation as of the time and place of injury?

Petitioner's question #4, "Can the question of seaman status be taken from the trier of fact?" proposes an entirely new standard of review for the issue of vessel in navigation. It would require reversing Roper v. United States, 368 U.S. 20, 22-23 (1961), in that Petitioner seems to ask for, and thus claim, the "question of seaman status" should be taken from the trial court any time a "reasonable person might conclude that the injured workman was not a seaman."

Petitioner really proposes a new form of summary judgment for seaman's status issues.

RESPONSE TO LIST OF PARTIES

Respondent accepts Petitioner's statement with respect to List of Parties.

RESPONSE TO RULE 29.1 STATEMENT OF RELATED CORPORATIONS

Respondent accepts Petitioner's statement with respect to Related Corporations, excepting that to the extent Mark Maring, a single individual, is the principal behind both corporations, Polmar Fisheries and Northland Fisheries, Inc. are the same entities.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent Susan Viola Hurlburt ("Hurlburt") prays that this Court deny Petitioner's request for a Writ of Certiorari to review the Memorandum Decision filed in these proceedings by the Ninth Circuit Court of Appeals on October 8, 1998.

JURISDICTION IN THE COURTS BELOW

Hurlburt agrees with Petitioner's statement regarding jurisdiction in the courts below.

REPORTS OF OPINIONS BY OTHER COURTS

Hurlburt suffered a back injury on May 17, 1995 while aboard the F/V NORTHLAND, which was undergoing minor maintenance and repairs between fishing seasons. There was nothing "major" or "structural" about this between-season maintenance and repair and the so-called "retrofit" Petitioner refers to. The so-called "retrofit" was nothing more than the addition of a different type of freezer system for freezing product aboard the ship. Neither the mission nor function of the vessel changed, in any respect. Always believing at all times she was a Jones Act/General Maritime Law seaman, Hurlburt does not and did not make any claim under Section 5(b) of The Longshore and Harbor Workers Compensation Act or 33 U.S.C. §905(b). On May 11, 1997, the District Court entered extensive findings of fact and conclusions of law, clearly holding that Hurlburt was a Jones Act/General Maritime Law seaman as of the time and place of her back injury. Petitioner correctly points out that Hurlburt filed no appeal from the trial court's decision and that the decision of the Court of Appeals on October 8, 1998 held that

Polmar was liable under Jones Act/General Maritime Law for the back injury. The hand injury, however, is no longer in dispute as Petitioner does not seek review of the Ninth Circuit Court of Appeals/Trial Court finding and judgment with respect to the hand injury, which occurred subsequent to the back injury.

JURISDICTION OF THE SUPREME COURT

Hurlburt agrees with Petitioner's statement with respect to the jurisdiction of this court.

CONSTITUTIONAL, STATUTORY AND OTHER AUTHORITY INVOLVED

No issues are raised by this Petition for Writ of Certiorari concerning the interrelationship of the Jones Act, 46 U.S.C. §688 and The Longshore Act as it was clear to the trial court that Hurlburt was a Jones Act/General Maritime Law seaman, and the Ninth Circuit Court of Appeals found ample evidence in the record to support the trial court's decision. Whether a vessel is in navigation is a question of fact to be reviewed by the appellate court for clearer error. Roper v. United States, 368 U.S.C. 20, 22-23 (1961).

STATEMENT OF THE CASE

A. Statement of Facts: Polmar and Northland are not separate entities and the trial record amply discloses there is a single principal who speaks and acts on behalf of both corporations, namely Mark Maring. Both Polmar and Northland represented in certificates filed and contracts and other documents at various times that each was the owner of the vessel F/V NORTHLAND. Substantial Coast Guard documentation, including documents generated for stability reports and related matters, discloses Polmar as the owner of the vessel F/V NORTHLAND. In spite of Petitioner's statements to the contrary, there is substantial evidence in the record, referenced by the Court of Appeals, that Polmar had absolute control over the F/V NORTHLAND as of the time

and place of Hurlburt's injury, including specifically, who went on the vessel and for what purpose.

As Petitioner points out, Roger Ortman, a personnel director employed by Polmar, was responsible for hiring crew on behalf of the owners of vessels managed by Polmar. Hurlburt was hired by Ortman, as Petitioner freely admits, to work aboard the vessel, initially as a salmon processor and, subsequently, as a cook. There were multiple crew contracts signed by Hurlburt, including a contract specifically covering the period of the back injury on May 17, 1995, which contract specifically provided that Hurlburt was a member of the crew of the F/V NORTHLAND.

As Petitioner points out, prior to the back injury, Hurlburt had progressively worked her way up as a member of the crew of the F/V NORTHLAND, initially as a factory processor, then as a second cook, then as first cook with increased salary. Hurlburt's relationship with the vessel prior to the May 17, 1995 injury was, at all times, as a Jones Act/General Maritime Law seaman working as part of the crew of the vessel.

The "major retrofit" alleged by Petitioner is a gross overstatement of the between-season maintenance and repairs that were done on the F/V NORTHLAND from March to May 1995. The so-called "retrofit" work consisted of simply installing new blast freezers in the processing section of the

vessel. Neither the function nor the mission of the vessel changed in any respect, nor did the ownership.

While Petitioner makes much of the fact that the F/V NORTHLAND needed a new stability letter, Captain Greiner, Hurlburt's marine expert at trial, testified that any minor change in the balancing or weight distribution of the ship would require a new stability statement and this had nothing to do with the vessel being taken out of navigation. At no time was the watertight integrity of the vessel affected.

When Ortman asked Hurlburt to return aboard the vessel in early May 1995, he told Hurlburt that she and her husband were to work as cooks and needed to be on the vessel as crew came aboard to get ready to depart for the fishing grounds. In that capacity, Hurlburt ran the galley, purchased food and cooked for the crew prior to the May 17, 1995 injury. As of that date, there were at least seven crewmembers aboard for whom Hurlburt was cooking, and, in addition to her cooking function, Hurlburt cleaned staterooms. Indeed, the logbook of her work activities as of the date of the back injury on May 17, 1995 specifically states she was cleaning staterooms for crewmembers on that date, not performing longshore work, as Petitioner alleges. Ernie Marshall, who Petitioner identifies as a Polmar employee, testified that, as of the time and place that Hurlburt rejoined the vessel, virtually all of the between-season maintenance

work had been completed and there was no reason why the vessel could not have been immediately put to sea.

As of the time and place of Hurlburt's injury, Hurlburt was living, eating and sleeping aboard the vessel full-time, was permanently assigned to the vessel; was contributing to the mission and function of the vessel, to wit, acting as cook for the crew. Although the vessel was tied up at the time, it was subject to wave action and the navigation functions of the vessel, including equipment, engines, etc., were functional.

B. The Decision of the District Court: At trial, substantial evidence was produced to prove Polmar and Northland were one and the same and controlled by the same principal, Mark Maring.

Although at trial Petitioner alleged Polmar was Hurlburt's employer and that Hurlburt was a Longshore and Harbor Workers Act employee, Polmar did nothing with respect to its obligation under that Act, even if such were true. Indeed, Polmar did not pay Hurlburt's medical and only paid her benefits under the Act initially and very briefly. This led the Court to enter Finding of Fact #17: "Defendants [Polmar included] have consistently, arbitrarily and in bad faith failed to pay the required maintenance and cure and thus caused plaintiff to be evicted from her home, denied pain medications and to suffer the humiliation of collection proceedings against her. The Court finds that Defendants' conduct in this regard

was outrageous and intentional." Whether as maintenance and cure as a Jones Act/General Maritime Law seaman or with respect to benefits under the Longshore and Harbor Workers Act, 33 U.S.C. 905(a), Polmar **DID NOT** pay benefits to Hurlburt as required. Thus, Petitioner's claim, Brief, page 9, to the effect that Polmar "...secured the payment of compensation for Hurlburt's injuries as required by Section 4 of the Longshore Act, 33 U.S.C. 904" is completely false and constitutes a material misstatement of fact to this Court.

C. Decision of the Court of Appeals: The Ninth Circuit Court of Appeals correctly viewed the question as simply one of fact to be reviewed for clear error:

> Defendants next contend that Hurlburt is not entitled to recover for her back injury under the Jones Act because, at the time of the injury, the F/V NORTHLAND was not in navigation, an essential element of her claim as a seaman. The District Court found that the vessel was in navigation. Whether a vessel is "in navigation" is a question of fact, which we review for clear error of law. See Roper v. United States, 368 U.S. 20, 20-23 (1961).

The Court went on to state there was substantial evidence in the record from which the trial court could find that the F/V NORTHLAND was a vessel in navigation. The Ninth Circuit Court of Appeals specifically cited the fact that this vessel bore no relation whatsoever to the vessel in McKinley v. All

Alaskan Seafoods, Inc., 980 Fed.2d. 567 (Ninth Circuit) 1992, where a ship had been converted from an oil ship valued at $451,000 to a $14,000,000 processing vessel, and that, in this instance, there was no change in the mission and function of the vessel since the so-called "retrofit" was simply adding a new refrigeration system. As the Court stated:

> ...While reasonable minds might differ, we cannot say that the District Court's finding that she was in navigation was clearly erroneous. See Chandras, Inc. v. Latsis, 515 U.S. 347, 374 (1995)("[v] Vessels undergoing repairs or spending a relatively short period of time in dry dock are still considered to be in navigation, whereas ships being transformed through major overhauls or renovations are not."
>
> Decision at page 4.

Petitioner's concern that the Ninth Circuit Court of Appeals "...neither considered or remanded to the District Court for consideration of other evidence in the record which related to Hurlburt's status" is unfounded. The trial court thoroughly aired all issues and testimony with respect to Hurlburt's status, and the Court of Appeals reviewed this record. Nothing whatsoever would result from a remand. Petitioner amply aired its concerns, evidence and testimony on seamanship and related issues, as to Polmar and/or Northland. At trial, Hurlburt alleged the corporations were one and the same and,

while Petitioner maintained there were subtle differences between the entities, it had its day in court with respect to the fact issue of seamanship status. Thus, there is no basis under the Rules of the Supreme Court and, in particular, Rule 10(c), to consider granting a writ of certiorari. There are no special or important reasons for granting the writ in that the matter is entirely an issue of fact-based determination. The District Court's holding that Polmar and Northland were one and the same entities did not result in the District Court considering any less evidence or testimony or Petitioner making any less of a showing at trial. Accordingly, there is nothing in the record to support, as Petitioner claims, that the District Court chose not to consider seamanship status evidence because the District Court ultimately found Polmar and Northland to be the same entity. The stay of the mandate issued on November 27, 1998 referred to by Petitioner contained no support for Petitioner's argument and was simply a one-word order allowing the mandate to be stayed.

RESPONSE TO REASONS FOR GRANTING THE WRIT

I. THIS CASE RAISES NO UNCERTAINTIES REGARDING ANY DIFFERENCES BETWEEN SEAMEN AND LAND-BASED WORKERS COVERED UNDER THE LONGSHORE ACT.

Petitioner first ends its argument with words to the effect that this Court should accept review in order to resolve uncertainties between seamen and land-based workers by arguing that "...the line between land-based and sea-based maritime workers, though it may be clear in theory, has proven very difficult to draw in practice." Brief, page 14. This case, however, does not present any ambiguity regarding this distinction. In this case, it was clear that Hurlburt was a Jones Act/General Maritime Law seaman.

Petitioner's entire claim under this section is based on its statement to this Court that Hurlburt "...at the time of her injury...had no connection whatever to any vessel that was capable of putting to sea..." This is again a material misstatement of the record in this case, as is evident from the trial court's findings of fact and the Court of Appeal's review of the trial court's record. Hurlburt's connection to the F/V NORTHLAND was substantial and the F/V NORTHLAND was not, as Petitioner asserts, a vessel incapable of putting to sea. Hurlburt's connection to the vessel consisted of: (1)

Living, eating and sleeping full-time aboard the vessel as of the time and place of her injury; (2) working as an identified member of a crew with a specific position, to wit, cook; (3) performing shipboard duties consistent with being a member of the crew, including duties on the day of her injury that consisted of cooking and cleaning staterooms; (4) boarding the vessel at the invitation of Roger Ortman, acknowledged by Petitioner to be a representative of Northland that hired crew for the F/V NORTHLAND; (5) working under a written contract specifically covering the date of her injury wherein she was hired to perform the function of cook.

With respect to navigational issues, the F/V NORTHLAND, as of the time and place of the May 17, 1995 injury: (1) Was never in "dry dock," as Petitioner maintains, but was tied alongside the dock in the shipyard; (2) never had its watertight integrity breached or any work done that breached the "box girder" watertight integrity; (3) had nothing more substantial in the way of a "retrofit" done to it other than the addition of new blast freezers with some minor modification of existing decks; (4) as of the time and place of Hurlburt's back injury, had substantially completed all of the repairs, maintenance and so-called "retrofit" such that all that remained was a minor paint schedule and associated matters.

The facts as stated above were exhaustively reviewed by the trier of fact, and the Ninth Circuit did not, as Petitioner

alleged, find Hurlburt a Jones Act/General Maritime Law seaman "...merely because she was injured on a vessel in navigation, without allowing or requiring the trier of fact to consider other circumstances bearing on her employment status." The trial court entered substantial findings of fact directly relating to Hurlburt's seamanship status, including several dealing specifically with the issue of navigation. For example, Finding of Fact 8, finding that Hurlburt was operating under a signed written contract with defendants, which made her a cook aboard the vessel; Finding of Fact 9, finding that, contrary to Petitioner's direct allegation, upon being asked to do scraping and grinding work, she refused to do so, informing supervisors that they had not been hired to do this form of work, but instead was a member of the crew; Finding of Fact 10, Hurlburt, contacted both by Roger Ortman and a second Northland representative, Neil Anderson, affirming that she was to act as cook for the salmon season, to return to the vessel, to prepare the vessel for the forthcoming salmon season and to sign a contract to that effect (indeed, Hurlburt left with the vessel for the fishing grounds and served as a cook); Finding of Fact 13, finding that Hurlburt was cooking for crewmembers as of the time and place of her injury and had been buying food with money provided by Northland; Finding of Fact 15, finding that the watertight integrity of the vessel was unaffected by the work, that the

vessel remained a fish processor, that relative to the value of the vessel, the work performed did not increase its value so significantly that the vessel could have been considered to be out of navigation. Thus, this case presents no basis for reconsidering or disturbing the substantial body of law on these issues, including McDermott International, Inc. v. Wilander, 498 U.S. 337, 347 (1991); Chandras v. Latsis, 515 U.S. 347, 355-56 (1995); Harbor Tug & Barge Co. v. Papai, 520 U.S. 548 (1997) and Southwest Marine, Inc. v. Gizoni, 502 U.S. 81(1991).

II. THIS COURT HAS NO NEED, AS PETITIONER ALLEGES, TO CLARIFY THE REQUIREMENTS OF THE JONES ACT WITH RESPECT TO EMPLOYMENT STATUS, INCLUDING A SUBSTANTIAL CONNECTION TO A VESSEL IN NAVIGATION

Petitioner seems to quarrel with Hurlburt's employment-related status to the vessel and again raises issues regarding the requirement of vessels in navigation. Petitioner correctly points out that the purpose of requiring workers to be connected to a vessel in navigation is to further the Congressional aim of providing a remedy under the Jones Act to seafaring workers whose employment exposes them to the perils of the sea. Petitioners Brief, page 21.

Petitioner then argues that the decision of the Court of Appeals is "inconsistent" with these requirements. Again, Petitioner argues facts that are thoroughly reviewed, including issues about cost and purpose of the retrofit, how extensive the retrofit was and whether the vessel could be put to sea – again, all fact issues thoroughly explored by the trial court, a record found by the Court of Appeals to be sufficient for purposes of the District Court deciding the way it did.

Hurlburt's case is one that does not raise new issues regarding seamanship status. If there ever was any doubt, and there wasn't, all doubts were erased by learning what Hurlburt ended up doing on the vessel. Hurlburt lived aboard the vessel from early May 1995 and continued on with the vessel, albeit with a bad back, after the vessel departed for the fishing grounds. If, as Petitioner alleges, Hurlburt was not a Jones Act/General Maritime Law seaman, why did she continue on with the vessel, never leaving the vessel, always living and working full-time aboard the vessel, and departing with the vessel when it went to the fishing grounds where she served as a cook? Unlike what Petitioner claims, this is not a case where an individual had only a transitory connection with a vessel and had no connection when it departed for sea, as is often the case when seamanship is challenged.

The navigability of the F/V NORTHLAND was hotly contested at trial. Substantial admissions by

Polmar/Northland at trial clearly indicated the vessel was not a "dead ship," as Petitioner seems to allege. When compared to initial costs many years ago, the value of the new refrigeration system seemed extensive proportionately, but it was only a small percentage of the overall insured value of the vessel. The so-called "substantial portions" of the ship's structure, which were demolished and rebuilt, consisted of the freezer area and, to a much lesser extent, the movement of decks. The impact regarding the propulsion system and engines was, again, only marginal. While there may have been work to the fuel oil vents, there was no redoing of the engines, new engines, change in engines, change in ship's electrical, etc. Representatives of Polmar/Northland testified, in essence, that with a few minor measures, the F/V NORTHLAND could have immediately set for sea in early May 1995. The stability letter discussed earlier simply refers to a revision in stability required any time a change in weight distribution on the vessel is effected.

Contrary to Petitioner's assertion, the Congressional purpose of the Jones Act would be frustrated if this Court were to enter into these proceedings on the grounds alleged by Petitioner. Petitioner seems to argue for a standard that would make any persons working aboard vessels that were tied up at docks, for whatever reason, incapable of becoming Jones Act/General Maritime Law seaman.

Finally, and of equal importance, is the unchallenged fact that Petitioner never treated Hurlburt as if she were a longshore worker. Finding of Fact 17, never challenged and never appealed by Petitioner, specifically found that both Polmar and Northland, individually or collectively, in bad faith failed to pay Hurlburt's medical expenses. Indeed, the record demonstrates and the findings confirm that Hurlburt was deprived of medical cure and was forced to suffer pain, "denied pain medications," because these entities were not paying anything on behalf of Hurlburt, no matter how denominated – Jones Act seaman, General Maritime Law or Longshore Harbor Workers Act. The Court specifically found: "The Court finds that Defendant's conduct in this regard [denial of medical cure and maintenance] was outrageous and intentional." Finding of Fact 17, page 14, A-14, Petitioner's Brief.

III. THERE IS NO NEED TO CLARIFY THE TRIER OF FACT'S OBLIGATION WITH RESPECT TO MAKING A DETERMINATION WHETHER THE CLAIMANT IS COVERED UNDER THE JONES ACT OR THE LONGSHORE ACT.

A. Standard of Review. Petitioner's allegation that the Court of Appeals "applied an improper legal standard to the question of seaman status" is completely unfounded. The Court applied the correct standard as set forth in Roper v. United States, 368 U.S. 20, 22-23 (1961), a standard setting

forth that a question of fact shall be reviewed by the appellate courts for clear error. That is exactly what the Court of Appeals did in this case, finding substantial evidence in the record to support the trial court's decision. There is no "question of law" "subject to de novo review."

B. The Court Of Appeals Did Not Decide A Federal Question In Any Way That Conflicts With The Applicable Decisions Of This Court. As pointed out above, the Court of Appeals did not conclude Hurlburt was a seaman merely because she was aboard a vessel in navigation. The two-element test of Chandras v. Latsis, *supra*, to the effect that an employee's duties must contribute to the function of the vessel or accomplishment of its mission and the employee must have a connection to a vessel in navigation, was thoroughly analyzed by the Court of Appeals and thoroughly tried by the trial court. Hurlburt was deemed to have been providing services contributing to the function of the vessel and to have had a permanent connection to the vessel, having lived and worked aboard the vessel throughout all time periods relevant to this issue. The totality of these circumstances were analyzed in detail in both the trial court and the Court of Appeals.

IV. THE COURT OF APPEALS DID NOT ACT CONTRARY TO DECISIONS OF THE SUPREME COURT AS TO THE ROLE OF THE TRIER OF FACT WITH RESPECT TO DETERMINING THE STATUS OF MARITIME WORKERS.

A. The Record Contains Substantial Evidence That Hurlburt Was A Seaman As Of The Time And Place Of Her Injury. Petitioner's briefing on the above issue is exceptionally vague and fails to point out that the only time that counts is the time of the actual injury, May 17, 1995. It is not, as Petitioner alleges, a requirement that Hurlburt show that she was aboard the vessel as a seaman during the entire "retrofit."

Contrary to Petitioner's allegation that Hurlburt was discharged as a member of the crew in March 1995, the trial court found that Hurlburt was under contract on the May 17, 1995 date of injury as a cook aboard the vessel. The contract status in March 1995 is irrelevant, even though, as Hurlburt proved at trial, she was then under a previous contract as a crewmember for the vessel. Hurlburt did not come aboard the vessel for purposes of acting as a longshore worker; indeed, just as Finding of Fact 9 points out, when defendants attempted to get Hurlburt to perform longshore-type work such as hammering, etc., Hurlburt left the vessel until

Polmar/Northland agents Robert Ortman and Neil Anderson asked her to come back to cook for the salmon season.

Petitioner's claim, Brief, page 29, to the effect that "Mrs. Hurlburt's work during the retrofit was not covered by crew contract or other written agreement" is directly contradicted by unchallenged Finding of Fact 10, Trial Court Decision, page A-12, which specifically found there was a signed contract hiring her as first cook. It is true that the contract was not signed until June 10, 1995, however, the previous contract in the exact same form (only the position changed) covered the 120-day period prior to the June 10 contract. See Finding of Fact 16, also unchallenged, "The contracts signed by plaintiff all indicated that they were for at least 120 days' duration..." Trial Court Decision, page A-14. While paychecks may have been issued by Polmar, this was significant to the Court of Appeals only to determine which of the two defendants, under circumstances where only one defendant could be responsible, would be held liable for the Jones Act remedies.

B. Nothing In The Court of Appeals' Decision Suggests That The Court of Appeals Ruled That The Question Of Seamanship Status Should Be Withdrawn From The Trier Of Fact. For reasons that are not self-evident, Petitioner argues: "The Court of Appeals erred in withdrawing the question of seaman status from the trier of

fact." Yet, nothing in any of the Court of Appeals' decision suggests in any way that it held, or withdrew, the question of seamanship status from the trier of fact. To the contrary, the Court of Appeals reviewed the record and found a substantial basis for the trier of fact to make the decision it did. Again, the Court of Appeals specifically held: "...Whether a vessel is in navigation is a question of fact, which we review for clear error. See Roper v. United States, 368 U.S. 20, 22-23 (1961)." Decision of the Court of Appeals, page A-3. Again, the Court of Appeals stated: "While reasonable minds might differ, we cannot say that the District Court's finding that she was in navigation was clearly erroneous." At page A-4.

Petitioner's "illustration" of how the trier of fact "might have been misled," Brief, page 33, is puzzling and suggests facts and issues unrelated to any issue in this case. Petitioner suggests this Court consider "what if" Hurlburt had worked for some other company, "such as a pipe fitting or metal working contractor," living off the vessel, working for a different employer, having no connection with the vessel whatsoever. Or, Petitioner urges that the Court consider "what if" Hurlburt had been hired by a union hiring hall. These are hypotheticals completely unrelated to this case and this entire portion of Petitioner's briefing should be disregarded as irrelevant and supercilious.

If anything, the fact that the trial court found Polmar and Northland to be one and the same proves the trial court considered all of the evidence equally with respect to each defendant. The trial court did not draw any distinction between Polmar and Northland when it came to facts in the record regarding Jones Act/General Maritime Law status. The trial court thoroughly analyzed these issues with respect to both defendants. Nothing would be served in a remand to the trial court or any further analysis.

Moreover, based on this record, it is clear that even if Petitioner had an argument for application of the Longshore Act, that Act itself discloses that Hurlburt would be entitled to Jones Act/General Maritime Law remedies because of how horribly Polmar has mishandled and failed to pay Hurlburt any benefits. The Act, at 33 U.S.C. §905A-B, subpart (a), states, in pertinent part:

> (a) Employer Liability; failure of employer to secure payment of compensation.
>
> The liability of an employer proscribed in Section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee...except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to

> maintain an action at law or in admiralty for damages on account of such injury or death...

As stated above, Polmar did not challenge Finding of Fact 17, "Defendants have consistently, arbitrarily and in bad faith failed to pay the required maintenance and cure and thus have caused plaintiff to be evicted from her home, denied pain medications and to suffer the humiliation of collection proceedings against her. The Court finds the defendant's conduct in this regard was outrageous and intentional." Page A-14. And, indeed, Polmar even admits that it stopped paying compensation, including payment of compensation under the Longshore Act. Specifically, at Petitioner's Brief, page 35, Petitioner states:

> ...When Mrs. Hurlburt reported her back injury to Polmar, Polmar reported it to the longshore compensation carrier. Compensation benefits were paid until Mrs. Hurlburt's attorney wrote a letter demanding that she be compensated as a seaman rather than a longshoreman.

In other words, even though Polmar now claims and, according to its brief, believes Hurlburt was a longshoreman, Polmar failed to pay any benefits, blaming its insurer, and allowed Mrs. Hurlburt to be denied medical cure, including pain medications. It is evident that Polmar knew of its duty and failed to follow through. How, now, Polmar can argue

that Hurlburt was longshore and acknowledge, by way of failure to appeal, a finding of outrageous conduct and denial of benefits, is unexplained. The Act makes it very clear that Hurlburt was entitled to admiralty remedies even if she was longshore under circumstances where benefits were denied, as is admitted in this case. This, alone, negates any argument of Petitioner to the extent that Petitioner has any valid argument, at all, that Hurlburt was a longshoreman.

V. THIS COURT SHOULD NOT ACCEPT REVIEW OF THIS MATTER, AND NOTHING IN THESE PROCEEDINGS WOULD ASSIST MARITIME EMPLOYERS IN PREDICTING WHO WOULD BE COVERED BY THE LONGSHORE ACT.

Incredibly, Petitioner argues that which form of insurance a defendant purchases should determine the status of the claimant! Petitioner argues, Brief, page 34, that, because Northland claims to have obtained standard protection and indemnity insurance to cover seaman injuries and Polmar obtained on-shore coverage, and the Court of Appeals held Polmar liable, the Court should correspondingly find that Hurlburt was not a seaman! There is no law, no statute and no authority for this proposition. Further, it is disingenuous for Petitioner to suggest this argument when it did not provide longshore remedies to Hurlburt and let her suffer in pain for want of medication and cure. Again, see

Finding of Fact 17, finding that Polmar's and Northland's actions were outrageous and had the effect of Hurlburt not having pain medications and being driven out of her home. If this Court was to accept Petitioner's argument, this Court would be rewriting Congressional law on a basis that has no support statutorily or in the common law.

Petitioner also substantially and materially misstates the record when it claims "Northland Fisheries...observed strictly at all times the requirements of State law pertaining to observance of corporate formalities, separation of assets, adequacy of capitalization, financial responsibilities and other requirements for preserving their corporate form." Brief, page 35. In fact, the record indicates exactly the opposite. The record discloses that a single individual, Mark Maring, was the corporate embodiment for both Polmar and Northland. Mr. Maring constituted every officer and the entirety of the Board of Directors for Polmar Corporation. At the same time, he was a member of the Board of Directors and the main officer for Northland Corporation. Northland and Polmar commingled all of their assets involved in this case. Indeed, they shared the same telephone number, had the same address, were physically located in the same place, used the same personnel, were run by the same individual and were so bound up in each other that they were indistinguishable. Thus, it strains credulity and raises questions of fairness for Petitioner

to state, as fact, what the record so clearly and unequivocally demonstrates to the contrary.

CONCLUSION

This Petitioner has so substantially misstated the record that some of its fact allegations raise questions of fairness with respect to the Court considering its petition. Much of what Polmar urges as "fact" is belied by a simple reading of the trial court's decision, the Court of Appeals' review of that decision and the unchallenged findings of fact entered by the trial court, including the unchallenged finding of fact that Polmar treated Hurlburt outrageously in its denial of medical benefits, a denial which makes Polmar's claim that Hurlburt is a longshore worker, covered by longshore benefits, the epitome of inconsistency. There is nothing significant in this case with respect to raising issues that should cause this Court to reconsider any of its law on matters of seamanship status. There is no confusion, as Petitioner alleges, with respect to the role of the trier of fact as demonstrated by the actions of the Court of Appeals, which correctly reviewed the record to determine whether there was clear error based on the record and the Court's decision. To grant Petitioner's petition would turn the process of reviewing the matter for clear error on its head and would create a new standard that is wholly inconsistent with the cases cited by

Petitioner. In bringing this petition, Petitioner has again succeeded in delaying and denying Hurlburt any remedy, or the benefits of law, whether as a Jones Act seaman or longshoreman in that it does nothing for Hurlburt other than prolong litigation to delay the inevitable. The petition should be denied and defendant Polmar should face the day when it is made responsible for its inconsistent and largely reprehensible actions.

Respectfully submitted on this 12th day of April, 1999.

UNIVERSITY PLACE LAW OFFICES

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